

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK**

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**RICHIE FOSTER LEVINE,**

**Plaintiff,**

**1:22-cv-891  
(GLS/DJS)**

**v.**

**PATRICK BABIARZ et al.,**

**Defendants.**

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**SUMMARY ORDER**

Plaintiff *pro se* Richie Foster Levine commenced this civil rights action against defendants Patrick Babiarz, Donald G. Cannon, and Bank of America CDFI Funding Corporation pursuant to 42 U.S.C. § 1983. (Compl., Dkt. No. 1.) On October 25, 2022, Magistrate Judge Daniel J. Stewart issued a Report-Recommendation and Order (R&R), which recommends dismissal of all claims with the exception of the claims against Babiarz for malicious prosecution and fabrication of evidence, in his individual capacity. (Dkt. No. 8.) Pending before the court are Levine's objections to the R&R. (Dkt. No. 9.)

If a party has objected to specific elements of the magistrate judge's findings and recommendations, this court reviews those findings and

recommendations *de novo*. See *Almonte*, No. 04-CV-484, 2006 WL 149049, at \*6-7. In those cases where no party has filed an objection, or only a vague or general objection has been filed, this court reviews the findings and recommendations of the magistrate judge for clear error.<sup>1</sup> See *id.* The court retains the discretion to review any part of an R&R *de novo*. *Id.* at \*5.

Levine has specifically objected to portions of the R&R. First, Levine argues that his false arrest claim against Babiarz was not untimely because the claim could not accrue until the underlying conviction was reversed. (Dkt. No. 9 ¶¶ 2-6.) Second, Levine contends that Cannon is not entitled to judicial immunity because he was “acting in the clear absence of all jurisdiction.” (*Id.* ¶¶ 7-13.) The court notes that, in his objections, Levine ostensibly concedes that Bank of America is not a proper party to this suit and does not assert a specific objection to this conclusion.<sup>2</sup> (*Id.* ¶¶ 14-15.)

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<sup>1</sup> “[A] report is clearly erroneous if the court determines that there is a mistake of fact or law which is obvious and affects substantial rights.” *Almonte*, 2006 WL 149049, at \*6.

<sup>2</sup> At most, Levine expresses a general disagreement with the R&R’s recommendation of dismissal of his claims against Bank of America, which merits review of this recommendation for clear error only. See

Levine's specific objection to the recommendation that his claim against Babiarz for false arrest be dismissed as untimely triggers *de novo* review. See *Almonte*, No. Civ. 04-CV-484, 2006 WL 149049, at \*3. Additionally, the court exercises its discretion to review *de novo* the recommendation to dismiss Levine's claims against Babiarz related to unlawful search and seizure and abuse of process as untimely. (Dkt. No. 8 at 11-14.) As explained below, the court rejects the R&R to the extent it recommends dismissal for untimeliness. (*Id.*)

A court should not dismiss a complaint with prejudice on the basis of an anticipated statute of limitations defense without first granting a *pro se* plaintiff notice and an opportunity to be heard. See *Abbas v. Dixon*, 480 F.3d 636, 639-40 (2d Cir. 2007). The R&R has arguably provided Levine with both adequate notice and an opportunity to be heard; indeed, Levine specifically objects to the recommendation that his false arrest claim be dismissed as untimely. (Dkt. No. 9 at 1-3.) In an abundance of caution, however, the court will permit Levine to further respond to the statute of

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*Almonte*, No. Civ. 04-CV-484, 2006 WL 149049, at \*5-6. Additionally, the primary reason for the recommendation of dismissal of all claims against Bank of America is that Levine has failed to plausibly allege state action or articulate any personal involvement. (Dkt. No. 8 at 7-9.) Levine does not object to either conclusion. (See *generally* Dkt. No. 9.)

limitations issue raised in the R&R. (Dkt. No. 8 at 11-14.) That is, Levine must demonstrate why the relevant statutes of limitation have not run by, perhaps, addressing whether, among other things, equitable tolling applies. *See Victorial v. Burge*, 477 F. Supp. 2d 652, 654 (S.D.N.Y. 2007) (“A litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way.”) (internal quotation marks and citations omitted). Levine should be mindful that he should address only the statute of limitations issue and not rehash old arguments or make new allegations.

As for the recommendation that Cannon be dismissed from this case on the basis of judicial immunity, Levine’s specific objection requires *de novo* review. *See Almonte*, No. Civ. 04-CV-484, 2006 WL 149049, at \*3. Levine has not pleaded any facts that indicate Cannon was acting outside of his capacity as a judge. (See *generally* Dkt. No. 9.) Having carefully considered the issue anew, for the same reasons in the R&R, (Dkt. No. 8 at 4-7), the court adopts the recommendation that all claims against Cannon be dismissed.

As for the balance of the R&R, the court finds no clear error and

adopts it. See *Almonte*, No. Civ. 04-CV-484, 2006 WL 149049, at \*5-6.

Accordingly, it is hereby

**ORDERED** that the Report-Recommendation and Order (Dkt. No. 8) is **ADOPTED IN PART** and **REJECTED IN PART** as follows:

**REJECTED** to the extent that it recommends dismissal of Levine's false arrest, search and seizure, and abuse of process claims against Babiarz on statute of limitation grounds; and

**ADOPTED** in all other respects; and it is further

**ORDERED** that all claims against Cannon and Bank of America are **DISMISSED**; and it is further

**ORDERED** that the Clerk **TERMINATE** Cannon and Bank of America as defendants; and it is further

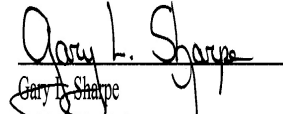
**ORDERED** that the claims for malicious prosecution and fabrication of evidence against Babiarz in his individual capacity survive initial review; and it is further

**ORDERED** that Levine shall, in writing, supplement his arguments on the statute of limitation issue regarding his claims against Babiarz for false arrest, search and seizure, and abuse of process within thirty (30) days from the date of this Summary Order; and it is further

**ORDERED** that the Clerk provide a copy of this Summary Order to Levine in accordance with the Local Rules of Practice.

**IT IS SO ORDERED.**

June 7, 2023  
Albany, New York

  
Gary L. Sharpe  
U.S. District Judge